Law Reform Commission

# Development Schemes

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# Manitoba

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## DEVELOPMENT SCHEMES

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## CHAPTER 1

## INTRODUCTION

This Report considers a proposed amendment to *The Real Property Act* ("the RPA")[1] that would provide for the convenient and efficient recording of a common building scheme against title to land. The proposed amendment was brought to the Commission's attention by Edward (Ned) D. Brown, a member of the practising bar in Winnipeg.

A common building scheme or simply a "building scheme" is comprised of a collection of agreements between a property developer and the individual purchasers of land. The agreements provide for restrictions on the use of land (i.e., building design, construction materials and the activities permitted on the land) over and above any restrictions already imposed by a municipal zoning by-law or town planning scheme. Thus, a building scheme is similar in effect to a zoning by-law and is often described as a private zoning law.[2]

The purpose of the scheme is to ensure a certain standard of development which, in turn, maintains or enhances the market value of the lots. The developer seeks to maximize the purchase price of lots by ensuring that the first purchasers develop their lots in a manner that is aesthetically positive. Once the developer has sold all of the lots, the purchasers of lots and others with an interest (e.g., a mortgagee) will want the restrictions observed in order to maintain property values and support their peaceful use and occupation.

Under the current law, a building scheme is created gradually as each agreement is recorded as a caveat against each title. This piecemeal approach is inconvenient for developers and creates a risk that the scheme may be unenforceable, potentially frustrating the reasonable expectations of purchasers. In larger developments, it may take a number of years before all of the lots are sold and there is a risk that the scheme may be inconsistently applied. The developer may fail to obtain an agreement from other purchasers, may fail to record the scheme on title to other lots, may change the restrictions imposed on other lots or may go out of business. Differences in drafting styles and terminology used in the various agreements may make enforcement of the scheme difficult.

Manitoba law allows party wall, right of way and easement agreements to be registered by unilateral declaration and this report considers whether to extend the same privilege to

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[1] *The Real Property Act*, C.C.S.M. c. R30.

[2] Municipalities have statutory authority to create building restrictions in zoning by-laws and town planning schemes and also by conditions of approval for zoning by-law amendment (*The City of Winnipeg Charter*, S.M. 2002, c. 39, s. 240; *The Planning Act*, C.C.S.M. c. P80, s. 46) and subdivision approval (*The City of Winnipeg Charter*, ss. 259, 260 and 268; *The Planning Act*, ss. 70 and 72). This report addresses building restrictions created by private owners of land for which authority is found in the general law of property.

building schemes.[3] We have attached draft amending legislation as Appendix A which, we hope, will assist the reader in better understanding the recommendations in this report.

## A. ACKNOWLEDGMENTS

The Commission thanks Mr. Brown for his time, expertise, and assistance in the preparation of this report. The Commission also wishes to thank the staff of the Property Registry for their assistance and, in particular, Registrar General and Chief Operating Officer, Richard Wilson, Deputy Registrar General and District Registrar of the Winnipeg Land Titles Office, Barry Effler and Senior Deputy District Registrar of the Winnipeg Land Titles Office, Russell Davidson.

It should be noted, however, that the recommendations contained in this Report are those of the Commission and are not necessarily in agreement with those whom we consulted.

[3] R.P.A., s.76.

## CHAPTER 2

## THE LAW RELATING TO BUILDING SCHEMES

### A. THE GENERAL LAW

A building scheme is a variation of a restrictive covenant, a mechanism developed by Courts of Equity in the mid-19th century to enable a landowner to maintain or enhance the value of land by restricting the use of other land which he or she is selling.[1] Generally, the vendor obtains the purchaser's agreement to impose a restriction or burden on the land sold (the servient land) for the benefit of the land retained by the vendor (the dominant land).

At common law, because of the doctrine of privity of contract, covenants affecting land are binding only on the original parties to the covenant; they do not create an interest in land nor do they "run with the land" (bind successors in title).[2] In certain circumstances, the benefit of a covenant might run with the dominant land but the burden does not run with the servient land. This means that a subsequent owner of the dominant land can not enforce the covenant against a subsequent owner of the servient land -- only against the original covenantor. Since the latter no longer owns the land, the remedy of specific performance is not available and the dominant owner's remedy is limited to damages. To circumvent this problem, the purchaser may be required to obtain an identical covenant from the next owner, creating a chain of obligation, which will, in effect, run with the land. This is not a reliable solution, however, as such chains were easily broken if the purchaser fails to obtain the next owner's covenant.

Courts of Equity alleviated the harshness of the common law by creating rules under which both the benefit and the burden of a restrictive covenant might run with the land. In *Tulk v. Moxhay*, the Court held that, in order to run with the land, a restrictive covenant must:

- be negative in effect;
- touch and concern land and be for the benefit of land;
- attach to and be intended to run with the land; and
- benefit a dominant land and burden a servient land.[3]

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[1] Before the introduction of municipal zoning and planning laws, development schemes were a popular means of regulating the use of land. Developers continue to rely on development schemes to impose a higher standard than that set by zoning by-laws or in regions without municipal zoning and planning laws. See, for example, *Lebeau v. Low*, 2002 BCSC 687.

[2] *Austerberry v. Oldham Corp.*, (1885), 29 Ch. D. 750 (C.A.). Consideration of the doctrine of privity of estate is outside the scope of this report. For a discussion of the doctrine of privity of contract and proposals for its reform, see Manitoba Law Reform Commission, *Privity of Contract* (Report #80, 1993).

[3] *Tulk v. Moxhay*, (1848) 2 Ph. 774, 41 E.R. 1143 (Ch. Div). The doctrine in *Tulk v. Moxhay* continues to apply in Canada, see *Noble and Wolf v. Alley*, [1951] S.C.R. 64; *Can. Construction Co. Ltd. v. Beaver (Alberta) Lumber Ltd.*, [1955] S.C.R. 682; *Crump v. Kernahan*, (1995), 32 Alta. L.R. (3d) 192 (Alta. Q.B.); *Canada Safeway Ltd. v. Thompson (City)*, [1996] 10 W.W.R. 252 (Man. Q.B.).

A key requirement is that the covenant be negative in effect, generally restraining some activity on the servient land. While a negative restriction might be expressed in positive terms. the determining factor is whether the effect of the restriction is to restrain or to compel action. Positive obligations (which require some positive act, such as maintaining a road or contributing money) are purely personal obligations binding only on the parties to the agreement and do not, unless expressly permitted by statute, run with the land (absent a chain of obligation, as discussed above).

In order to touch and concern land and be for the benefit of land, a covenant must relate to a thing or activity on the servient land and must benefit the dominant land rather than the owner of the land. A covenant that meets all of these requirements creates an equitable interest in the servient land, binding subsequent owners of that land.

When larger land developments became more popular and before the advent of modern zoning and planning laws, developers of land sought to impose schemes of restrictions which mutually bound and benefitted all lots in the development. These restrictions could not run with the land due to the requirement of separate dominant and servient parcels. Equity again responded in *Elliston v. Reacher* which held that restrictions in a building scheme could run with the land where:

- title to the land is derived from a common vendor;
- the vendor has laid out the estate for sale, subject to restrictions intended to be imposed on all of the lots;
- the restrictions are intended to be for the benefit of all of the lots; and
- the owner (or his or her predecessor in title) purchased their lot from the common vendor on the basis that the restrictions were for the benefit of the other lots in the general scheme.[4]

The *Elliston v. Reacher* rules continue to govern although English courts have held that a building scheme may be enforced in the absence of a common vendor when it is clear that there is an intention to create a local law applicable to the development.[5] In Canada, however, there has been some reluctance to vary or supersede the common vendor rule.[6]

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[4] *Elliston v. Reacher*, [1908] 2 Ch. 374, affirmed [1908] 2 Ch. 665, (C.A.). The rules in *Elliston v. Reacher* continue to apply in Canada, see *West v. Hughes*, (1925), 58 O.L.R. 183 (Ont. S.C.); *Crump v. Kernahan*, *supra* n. 3; *Hemani v. British Pacific Properties Ltd.*, (1992), 70 B.C.L.R. (2d) 91 (S.C.); *Jacques v. Alexander (Local Government District)*, [1996] 7 W.W.R. 677 (Man. Q.B.).

[5] *Re Dolphin's Conveyance*, [1970] Ch. 654. Two sisters subdivided land and sold the lots, entering into restrictive covenants with each purchaser. The sisters transferred the unsold lots to their nephew, who continued to sell lots subject to common restrictions. The Court held that despite the absence of a common vendor, the covenants were valid and created an effective building scheme.

[6] *Re Lakhani v. Weinstein*, (1980), 118 D.L.R. (3d) 61(Ont. S.C.); *Cleary v. Pavlinovic*, (1987), 80 N.S.R. (2d) 22 at 28 (N.S.S.C. – TD).

In essence, a valid building scheme requires a defined plan in which the land is divided into identifiable parcels, the restrictions applicable to each lot are described, all of the purchasers buy the lots from the same vendor and the purchasers know that the covenants are for the benefit of the development as a whole. The main distinguishing feature or hallmark of the building scheme is the "community of interest" that it creates. Each parcel of land subject to the scheme bears both the benefit and burden of reciprocal and enforceable obligations.[7]

> A building scheme may exist when restrictive covenants are imposed during the course of development with the intent that once the scheme has crystallized on the sale of the first lot, the vendor will be bound by the scheme and the restrictions will be mutually enforceable by the purchasers of the various lots. The rationale for building schemes rests on the notion that because the restrictions are imposed for the general benefit of the development, all owners have a common interest in their enforcement. This underlying notion of community of interest imports reciprocity of obligation. Thus, under a valid building scheme, restrictive covenants are enforceable by and against the original purchasers and their assignees.[8]

## B. THE LAW IN OTHER CANADIAN JURISDICTIONS

British Columbia has enacted statutory building scheme legislation, permitting a developer to register a building scheme by unilateral declaration of the developer *before* lots are sold.[9] Saskatchewan permits the owner of land to grant a restrictive covenant in favour of land that he or she owns in favour of other land that he or she owns, expressly superseding the doctrine which invalidates a restrictive covenant when both the dominant and servient lands come into common ownership.[10]

We are not aware of any other statutory provisions relating to building schemes in any other Canadian province or territory thus, the provisions of the general law continue to govern.

## C. *THE REAL PROPERTY ACT*

Since the introduction of the RPA in 1885, the question of whether or not a building restriction or development scheme binds a subsequent owner of an interest in land depends on whether notice of the restriction is recorded on title before the owner acquired his or her interest. The general law still applies to the determination of the validity of a building scheme but its ultimate enforceability depends upon compliance with the statutory regime.

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[7] *Crump v. Kernahan*, *supra* n. 3 at 198.

[8] *Berry v. Indian Park Association*, (1999), 44 O.R. (3d) 301 at 308 (C.A.).

[9] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 220 (see Appendix B).

[10] *The Land Titles Act, 2000*, S.S. 2000, c.L-5.1, s .147.

> . . . the basic principles of [land registration] systems recognize that the register of titles is everything to the registered owner of land, and any person dealing with that owner, except in the case of fraud and a few other statutory exceptions. A building scheme seeking to restrict the use of land sold cannot conform to the basic principle of the Torrens system unless it can be determined from examining the title to land that it is subject to a restrictive covenant. As I understand the development of the Torrens system, it was basically designed to avoid the difficulties that arose from not being able to determine what interests besides those of the owner, encumbered a title deed under the common law land-holding system. In this case, I have found that there was no building scheme in existence, but even if there was it is not clearly defined enough to be registered under our *Land Title Act*.[11]

A building scheme creates an equitable interest in land which, to be enforceable against subsequent owners of land, must be recorded by caveat on title to the land. "[R]egistration of a caveat cannot by itself ground the creation of a valid restrictive covenant."[12] A caveat does not, in and of itself, create or confirm any rights or interests (such as a building restriction) -- it simply operates as notice of existing or claimed rights.[13] Once recorded on title, the building scheme will have priority over all subsequently registered interests until the caveat is discharged or the scheme is declared invalid.[14]

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[11] *Harder Homes Ltd. v. Stellar Development Ltd.* (1982), 135 D.L.R. (3d) 737 at 743 (Sask. Q.B.), Noble J.

[12] *Crump v. Kernahan, supra* n. 3 at 198.

[13] *Ram v. Jinnah*, (1982), 39 A.R. 40 at 49 (Alta. Q.B.): "A caveat cannot be a foundation for a claim against land. A caveat gives no substantive rights in itself. It is merely a warning of the existence of a claim. It creates no new rights...".

[14] R.P.A., s. 152.

## CHAPTER 3

## RECOMMENDATIONS FOR REFORM

Under the general law of property, one cannot create a building scheme unilaterally but must instead obtain an agreement from each lot purchaser. The RPA does permit the unilateral creation of other types of restrictions (party wall, right-of-way and easement) which are deemed to have the same effect as an agreement and run with the land.[1] British Columbia expressly provides for a statutory building scheme, allowing a developer to impose restrictions by unilateral declaration prior to the sale of lots.[2] In our opinion, a statutory scheme similar to that of British Columbia and s. 76 of the RPA would facilitate transactions and economic activity involving land and protect the reasonable expectations of owners. There is much to recommend such an amendment and, to our minds, very little against it.

### RECOMMENDATION 1

***The Real Property Act* should be amended to permit recording of a scheme of restrictions on title, either by caveat with agreement attached or by unilateral declaration in a form to be approved by the district registrar.**

### RECOMMENDATION 2

**A scheme created by unilateral declaration should have the same effect as an agreement.**

Clarity and consistency in terminology is generally desirable as it facilitates comprehension and encourages compliance. In our first recommendation, we refer to the *recording* rather than the *registration* of a development scheme. Both terms imply entry on the register but the difference between *recording* and *registration* lies in the legal consequences of each; the former confirms priority of the interest recorded while the latter confers both priority and ownership. Typically, legal interests in land (e.g., fee simple and leasehold title, mortgage) are registered whereas equitable interests (e.g., restrictive covenants, easements, equitable mortgages, options to purchase) are recorded on title. The RPA does not make clear the subtle yet significant difference in legal effect and, in our opinion, generic use of "registration" may lead to misunderstanding and error. Accordingly, in this report, we have chosen to maintain a rigorous distinction between the terms, as suggested by the Joint Land Titles Committee, in its 1990 report.

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[1] R.P.A., s. 76.

[2] *Land Title Act*, R.S.B.C. 1996, c. 250, s. 220, (see Appendix B).

> The similarity of the terms "recording" and "registration", and the use of the term "registration" in respect of deed registration and caveat registration, thus create some difficulties of communication and comprehension. However, we think that if "recording" is rigorously used to denote a system of conferring and confirming priorities and "registration" is used to denote a system of conferring and confirming both priorities and ownership, the terminology will be found more convenient and useful.[3]

Another area of possible confusion is the term "building restriction" as various terms are used in legislation including "building restriction", "building restriction caveat", "building restriction covenant", "building restriction agreement" and "restriction".[4] There is no definition of building restriction in the RPA and the definition found in *The City of Winnipeg Charter* more accurately describes a caveat, which gives notice of a restriction, and not the restriction itself.

A building restriction should be clearly defined in the Act and cover the full range of activity typically covered by such restrictions. A usefui example is found in the definition of "development" in *The Planning Act*:

> (a) the construction of a building on, over or under land;
> (b) a change in the use or intensity of use of a building or land;
> (c) the removal of soil or vegetation from land; and
> (d) the deposit or stockpiling of soil or material on land and the excavation of land.[5]

This definition better describes the type of activity covered by building restrictions although we would add "use or intensity of use of land" as well as "a change in the use or intensity of use". Ideally, this definition should be used consistently in all legislation.

**RECOMMENDATION 3**

> ***The Real Property Act* should include a definition of "building restriction" as a restriction on the construction of buildings, fences and other structures on, over or under land, the use, intensity of use and any change in the use or intensity of use of a building or land, the removal of soil or vegetation from land, the deposit or stockpiling of soil or material on land, and the excavation of land, that is negative in effect and benefits other land.**

Borrowing from the definition of "development" suggests that building restrictions would be more accurately described as "development restrictions". In light of the fact that the term "building restriction" is a term of art which is well understood and frequently used, we would

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[3] Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada*, (1990) at 9.

[4] *The Municipal Board Act*, C.C.S.M. c. M240, s. 104; R.P.A., ss. 45(5), 104, 141 and 157; *The City of Winnipeg Charter*, S.M. 2002, c.39, s. 238.

[5] *The Planning Act*, C.C.S.M. c. P80, s.1. See also *The City of Winnipeg Charter*, s. 1.

not recommend such a change. The same rationale does not apply to building schemes. As noted in Megarry and Wade, the general law may have originated with building schemes but it now applies to other types of development schemes which include uniform covenants. Building schemes are a species of the development scheme genus.[6] The English Law Commission recommended the use of the term "development scheme" rather than building scheme and we agree that this term is appropriate, reflecting the substance and intent of such schemes.[7]

As noted above, the general law of property continues to apply alongside the statute law except where abrogated or superseded by the latter. To what extent, if at all, should the general law be codified in legislation? "[A]ny individual who has braved the legal jurisprudence on restrictive covenants will attest to the fact that it lacks consistency and is extremely complex."[8] A complete codification would require careful study and we are not prepared to recommend it at this time and in the context of this issue. That being said, it would be useful to incorporate some of the basic rules into legislation with appropriate modifications to assist drafters of development schemes and courts called upon to interpret and enforce them.

The goals of the general law and the land registration system are to promote certainty and notice, and accordingly the scheme must be clear and specific enough to provide both.[9] The instrument creating the scheme should therefore identify the lands affected (or not affected) clearly. In *Sekretov v. Toronto*, the Court held, relying on the decision in *Galbraith*, that the land benefiting from the restriction must be ascertainable from the instrument creating the restriction and not inferred from the surrounding circumstances.[10] In addition to the scope of the scheme, the substance of the restrictions should be described, in plain language. This is necessary both to prevent unwitting breach and to facilitate enforcement of the restrictions.

> . . . there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit. Not only must the area be defined, but the obligations to be imposed within that area must be defined. Those obligations need not be identical. For example, there may be houses of a certain value in one part and houses of a different value in another part. A building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from

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[6] C. Harplum, *Megarry and Wade: The Law of Real Property*, (6th ed, 2000) at 1037, citing *Brunner v. Greenslade*, [1971] Ch. 993 at 999.

[7] The Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants*, (Law Comm. No. 127, 1984) at 44.

[8] D.J. Manderscheid, Q.C., "Restrictive Covenants: An Alberta Perspective", (2000), 30 R.P.R. (3d) 23 at 26.

[9] *Harder Homes Ltd. v. Stellar Development Ltd.*, (1982), 135 D.L.R. (3d) 737 at 743.

[10] *Sekretov v. Toronto*, (1973), 33 D.L.R. (3d) 257 (Ont. C.A.); *Galbraith, v. Madawaska Club Ltd.*, [1961] S.C.R. 639.

> various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors upon a definite area.[11]

While the general law does not require that lands affected by a scheme be contiguous, they must be reasonably proximate.[12] The greater the distance between the land affected by restrictions, the less likely a true community of interest can be created or maintained. Therefore, a requirement of reasonable proximity of the affected lands should be made explicit in the Act. We acknowledge that "reasonably proximate" is a somewhat ambiguous standard but are confident that a court considering the question in a specific case would have little difficulty in deciding the matter.

As an intention to create a special local law is essential, the instrument creating a development scheme should expressly state that the restrictions are intended to run with the land. As well, the Act should require the consistent or uniform application of the restrictions within the defined area. The restrictions need not be identical but they must be consistent with a general scheme of development.[13]

Under the general law, a developer may reserve the right to exempt unsold lots from the scheme after crystallization[14] but this seems to us contrary to the goals of certainty and notice. The legislation should favour the reasonable expectations of purchasers who may have relied on the application of the scheme to all lands. As noted in Megarry and Wade, the purpose of the covenant is lost if it cannot be enforced both against previous purchasers of lots and subsequent purchasers of unsold lots.[15]

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[11] *Reid v. Bickerstaff*, [1909] 2 Ch. 305 (C.A.) at 319, Cozens-Hardy, M.R.

[12] *The Law of Real Property , supra*, n. 6 at 1018. In *880682 Alberta Ltd. v. Molson Breweries Properties Ltd.* [2003] 2 W.W.R. 642 at 650-51 (Alta. Q.B.), Molson sold its former brewery in Calgary and imposed a condition that the land could not be used for a brewery in future. A restrictive covenant was registered against the Calgary land in favour of Molson's land in Edmonton. The Court held that the restrictive covenant did not bind successive owners of the Calgary land because it did not "touch or concern" the Edmonton land, the dominant and servient lands were not sufficiently proximate and the covenant only collaterally and incidentally benefited the Edmonton lands, the primary benefit being to the business conducted on the land.

[13] *Elliston v. Reacher*, [1908] 2 Ch. 374 at 384 affirmed [1908] 2 Ch. 655 (CA) at 384, *Reid v. Bickerstaff, supra* n. 11.

[14] *Elliston*, at 387.

[15] *The Law of Real Property , supra* n. 6 at 1034.

**RECOMMENDATION 4**

***The Real Property Act*** **should include a definition of "development scheme" as an agreement or declaration which is expressly intended to constitute a special local law and which:**

- **(a) affects two or more parcels, each of which is identified by reference to its legal description;**
- **(b) contains one or more building restrictions which are:**
  - **(i) clearly intended to attach to and run with the land; and**
  - **(ii) clearly described so that a reasonable person may understand and comply;**
- **(c) applies to land which is reasonably proximate but not necessarily contiguous;**
- **(d) is consistent with a general scheme of development and affects all lots in a uniform but not necessarily identically way; and**
- **(e) clearly identifies any variations in or exemptions from the terms of the scheme and the lots to which these variations or exemptions apply.**

To further assist drafters, the district registrar should create a statutory form similar to that found in the British Columbia regulations but, as in British Columbia, use of the form should be voluntary.[16] Drafters should have the option of using their own form, as long as it meets the minimum requirements of the Act and the district registrar.

**RECOMMENDATION 5**

**The district registrar should create a standard form development scheme declaration to provide minimum formal requirements and guidance to persons wishing to create and record a development scheme.**

It should be clear that inclusion of substantive rules in the Act does not impose new duties on the district registrar to examine instruments for substantive content. It would be an unreasonable burden as well as a significant departure from current practice and we do not intend that the district registrar's responsibility be affected by these amendments.

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[16] *Land Title Act Regulation*, B.C. Reg. 334/79, (Form 35) and is attached as Appendix "C" to this report. (See also: http://www.bcrelinks.com/download/landtitle/form35.pdf.) The form is no longer mandatory as of January 2005, pursuant to the *Land Title and Survey Authority Act*, S.B.C 2004, c. 66, s. 104.

**RECOMMENDATION 6**

**The Act should expressly provide that recording of a development scheme is not a determination by the district registrar of the validity of the scheme and that the rules of equity and common law continue in force, except where inconsistent with the express provisions of the Act.**

We also considered whether positive obligations should be permitted in a development scheme. As noted above, positive obligations cannot run with the land but one writer has suggested that it would be easier for purchasers to understand and comply with a development scheme if the obligations were expressed as guidelines and in positive rather than negative terms.[17] Should the general law be amended to allow positive obligations to run with the land generally?

In Manitoba, some positive obligations run with the land by statutory authority. For example, purchasers of a lot in a residential subdivision will be bound by the developer's obligation to build municipal services such as roads and sewers (as long as the agreement is recorded on title) and purchasers of a condominium are bound to comply with obligations to contribute common expenses.[18]

The common law rules which prevent all positive obligations from running with the land have been widely acknowledged as harsh and illogical and both the English Law Commission and the Ontario Law Reform Commission have recommended that positive obligations should be permitted to run with the land.[19]

English courts have developed two exceptions to the common law rule based on the old maxim *Qui sentit commodum sentire debet et onus* or "he who enjoys the benefit ought also to bear the burden".[20] While there is case law which suggests that the benefit/burden exception *may* apply in Canada[21], the Ontario Court of Appeal expressly declined to adopt it:

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[17] B.D. McKay, "Real estate law annual review (Part 1: Aboriginal title, zoning and building schemes)", (The Continuing Legal Education Society of British Columbia, 2001), on line: http://www.cle.bc.ca/CLE/Analysis/Collection/01-30870-realprop1.htm. (Date accessed: May 31, 2006). Such guidelines have not met with judicial favour; see *Swiatlowski v. Jackman*, 2000 BCSC 553.

[18] *The Planning Act*, C.C.S.M. c. P80, s. 151; *The Condominium Act*, C.C.S.M. c. C170, s. 5(3). See also *The Surface Rights Act*, C.C.S.M. c.S235, s. 62 and *The Conservation Agreements Act*, C.C.S.M. c. C173, s. 3(2).

[19] *The Law of Positive and Restrictive Covenants*, *supra* n. 7 at 28 and 33; Ontario Law Reform Commission, *Report on Covenants affecting Freehold Land*, (1989) at 100. Trinidad and Tobago has enacted legislation to that effect, see *Land Law and Conveyancing Act, 1981*, Stats. Trin and Tob. 1981, No. 20.

[20] *Halsall v. Brizell* [1957] Ch. 169 at 180 and *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129 at 280 (Ch. Div). In *Rhone v. Stephens*, [1994] 2 All E.R. 65, the House of Lords narrowed the application of the benefit/burden exception.

[21] See *Parkinson v. Reid*, [1966] S.C.R. 162 at 168 and *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.*, [2002] 1 W.W.R. 520 at 533 (Alta. Q.B.).

> . . . it is my view that, having regard to the uncertainties and the many frailties of the existing common law in England in this area of the law, it would be inadvisable to adopt these principles in Ontario. Indeed, a review of the English experience with the doctrine of *Halsall v. Brizell*, lends further support to the conclusion that any reform to the rule in *Austerberry* is best left to the Legislature. It would appear from many of the commentaries that the English adoption of the benefit and burden exception may have created more problems than it has solved.[22]

The Court was not so much opposed to the exception as it was reluctant to tinker with a complex and convoluted area of law.

> In my view, the sheer number and complexity of issues that would have to be considered in order to address the various concerns relating to such reform of the law make it abundantly clear that any significant change requires a legislative initiative. A case-by-case approach would create unmanageable confusion and uncertainty in the law.[23]

We agree that the general law in this area is in need of reform but only after extensive study and consideration and, accordingly, we do not recommend any change in the context of this report.

Given that the common vendor rule is no longer required in England,[24] should it be abrogated in Manitoba? Canadian courts have been reluctant to dispense with the requirement although it seems due more to the lengthy reliance on *Elliston v. Reacher* than any principled basis.

> Attractive as is the theory that one looks to all the evidence in order to consider whether there is that community of interest and reciprocity of obligation that defines a building scheme and that the requirements in *Elliston v. Reacher* are only evidence which would be conclusive, I have to consider that *Elliston v. Reacher* has been followed so often in our Courts that the confusion a change of the law would give should occur only as a result of the decision of a higher Court. It is for this reason that I would follow the decision in *Pinewood* and hold that the absence of a common vendor is fatal to the existence of a building scheme.[25]

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[22] *Durham Condominium Corporation No. 123 v. Amberwood Investments Limited et al.*, (2002), 211 D.L.R. (4th) 1 at 32, per Charron J.

[23] *Id.*, at 19. For a strong argument in favour of adoption of the rule, see the dissenting opinion of MacPherson J.

[24] *Re Dolphin's Conveyance*, [1970] Ch. 654 at 664, per Stamp L.J.:

> Here the equity, in my judgment, arises not by the effect of an implication derived from the existence of the four points specified by Parker, J. in *Elliston v. Reacher* . . . or by the implication derived from the existence of a deed of mutual covenant, but by the existence of the common interest and the common intention actually expressed in the conveyances themselves.

[25] *Re Lakhani v. Weinstein*, (1980), 118 D.L.R. (3d) 61 at 68 (Ont H.C.J.) per VanCamp J.; See also *Cleary v. Pavlinovic*, (1987), 80 N.S.R. (2d) 22 at 28 (NSSC – TD).

In *Dorrell v. Mueller*,[26] the Ontario District Court upheld a building scheme that did not have a common vendor on the basis that scheme was recorded under *The Land Titles Act*. The decision is difficult to reconcile with *Crump v. Kernahan* which held that recording in and of itself cannot confer validity or "fix" an interest which is invalid under the general law.[27]

The requirement of a common vendor prevents two or more owners (e.g., a group of cottage owners) who wish to co-operate with each other from creating a development scheme for their respective parcels of land. It may also limit application of a development scheme in cases where the ownership of unsold lots in a subdivision development changes hands. In our view, the essential requirements of a development scheme are the "common intention" and "common interest" and identity of the vendor is irrelevant. As long as the instrument creating the scheme discloses the intention of the owner or owners of the land to create reciprocal obligations that run with the land and there is notice to purchasers of the nature, particulars and scope of the scheme, the validity of the scheme should be acknowledged.

In our view, the law should permit a development scheme started by one developer to be continued by his or her successor and should also permit a group of owners to "club" together to impose a development scheme on their respective parcels.[28] This would be accomplished by abrogation of the common vendor rule.

**RECOMMENDATION 7**

**The common vendor rule set out in *Elliston v. Reacher* should be expressly abrogated.**

Finally, we believe that section 7 of *The Law of Property Act*[29] which prohibits discriminatory restrictive covenants, should be amended to include development schemes and building restrictions. The section currently provides as follows:

> **Prohibition on covenants**
> 7(1) Every covenant which, but for this section, would be annexed to and run with land and which restricts the sale, ownership, occupation or use of land because of the race, nationality, religion, colour, sex, sexual orientation, age, marital status, family status, physical or mental handicap, ethnic or national origin, source of income or political belief of any person is void.
>
> **Exception re elderly persons**
> 7(2) Nothing in subsection (1) prohibits a covenant which restricts the sale, ownership, occupation or use of land in a manner consistent with the maintenance of the land primarily or exclusively for elderly persons.

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[26] *Dorrell v. Mueller*, (1975), 16 O.R. (2d) 795 at 807 (Ont Dist Ct).

[27] *Crump v. Kernahan*, (1995), 32 Alta. L.R. (3d) 192 at 196 (Q.B.).

[28] English Law Commission made a similar recommendation *supra* n. 7 at 58.

[29] *The Law of Property Act*, C.C.S.M. c. L90, s. 7

The exception for elderly persons requires clarification. It was enacted in 1986 as part of an omnibus statute intended to bring Manitoba legislation into compliance with the Charter.[30] We assume that the exception was intended to protect nursing homes for senior citizens but does it also apply to the modern "55 plus" residential developments? In our view, the exception requires greater precision with respect to the meaning of elderly or the purpose of the exception.

**RECOMMENDATION 8**

**Section 7 of *The Law of Property Act* should be amended to include building restrictions and development schemes.**

**RECOMMENDATION 9**

**Section 7(2) of *The Law of Property Act* should be amended to provide a precise definition of "elderly persons".**

The foregoing are suggested pre-requisites to validity of a development scheme; the following should be the pre-requisites to recording of the scheme on title. Recording does not confer validity on the scheme but it is necessary in order to enforce the scheme against subsequent owners of land.

First, all lands affected by the scheme should fall under the operation of the RPA and be described by reference to, at a minimum, their legal description.

The general law does not permit an owner of land to impose unilaterally restrictions on the use and development of a single parcel of land and we see no reason for any change. The essence of a development scheme is mutuality of obligation which cannot be created in respect of a single parcel. There must be both dominant and servient lands even though, under a development scheme, all lands are both dominant and servient at the same time. The second requirement, therefore, should be at leas two separate titles affected by the scheme.

Traditionally, building schemes are created through a series of sale transactions; however, consistent with our recommendation that the common vendor rule be abrogated, it should be clear that a development scheme may be created by one or more owners. This will allow multiple owners to club together (e.g., several cottage owners) to impose restrictions for their mutual benefit.

The development scheme must indicate an intention that the scheme attach to and run with the land and at least one restriction must be negative in effect *on its face*. As noted above, the district registrar should not be required to examine the content of restrictions. Thus, if there is at least one restriction which appears to be negative in effect, the instrument will meet the requirements for

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[30] *The Equal Rights Statute Amendment Act*, S.M. 1985 -1986, c.47, s. 26(1). The only reference in Hansard to the exception is found in the Standing Committee Minutes of July 9, 1985 at 91:

> The exception on page 5 with regard to elderly persons we believe is reasonable and feel that at the provisions of the Charter would uphold such provisions for the elderly

recording. The restrictions will still be open to challenge since recording does not, in and of itself, confer validity on the scheme.

Consistent with existing practice, consent of all persons with a registered interest in the land should be required. We considered whether to recommend dispensing with the consent of owners and encumbrancers that are unlikely to be affected by a development scheme (e.g. utility caveators). In British Columbia, the Director of Land Titles has discretion to waive the consent requirement but this proposal did not find favour with senior staff of Manitoba's Property Registry who are of the opinion that this will detract from the certainty and consistency which the consent requirement provides.

Finally, the formalities of execution set out in section 72(1) of the RPA should be required for a development scheme.[31]

**RECOMMENDATION 10**

**An instrument creating a development scheme may be registered on title to land if it:**

**(a) is in a form approved by the district registrar and executed in accordance with section 72(1) of *The Real Property Act*;**
**(b) affects two or more parcels of land all of which are registered under the Act and identified by legal description;**
**(c) is clearly intended to attach to and run with the land;**
**(d) has the consent of all persons whose names appear on the register as having a claim or interest before the date of the instrument;**
**(e) contains one or more restrictions which appear to be negative in effect.**

The Act provides for the termination or variation of a building restriction caveat by agreement or consent,[32] or by order of the Manitoba Municipal Board which has broad power to vary, cancel or substitute a building restriction.[33] The district registrar may vacate a building restriction that contains an expiry date but must, in any event, do so fifty years after the date of recording.[34]

A development scheme should also be subject to variation or termination in this way. We considered whether agreement or consent of a simple majority of the affected owners should be sufficient to vary or terminate a development scheme but ultimately decided that absolute unanimity is appropriate. Each owner takes his or her lot with notice of the restrictions and, we assume, relies on them and it would be unfair to permit variations by majority rule. In the absence of unanimous

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[31] An affidavit as to the execution by, and the identity and age of, the owner or person so entitled, and such other evidence as is required under *The Homesteads Act*, C.C.S.M. c.H80 or as the district registrar requires.

[32] R.P.A., s. 157(3) requires the agreement or consent of everyone with a registered interest in the lands affected by the scheme.

[33] *The Municipal Board Act*, C.C.S.M. M240, s. 104.

[34] R.P.A., ss. 157(5) and 159.

agreement, application could be made to the Municipal Board which has power to vary or terminate an agreement after a public hearing.

We do not agree that building restrictions should automatically expire after 50 years as is presently the case; however for the sake of consistency we cannot recommend that a different rule apply to development schemes. We encourage the Minister to reconsider this provision, which seems to be more concerned with administrative convenience than with protecting the interests and expectations of owners and encumbrancers who acquired their interest with notice of the scheme.

**RECOMMENDATION 11**

**The provisions of *The Real Property Act* and *The Municipal Board Act* respecting the vacating, varying, amending, discharging or lapsing of building restrictions should be amended to include development schemes.**

Should the legislation provide for "severability" of a development scheme provision so that in the event that one part of the scheme is declared invalid, the remainder of the scheme can continue in force? Whether the remainder of the scheme should survive depends on the particular restrictions in the scheme and whether they continue to be of benefit. Where the main benefit is defeated, the remaining obligations may become meaningless or unreasonably burdensome. In that circumstance, one or more affected owners may seek an order to terminate or vary the scheme, either from the court which made the declaration of invalidity or by application to the Municipal Board.

Section 141 of the RPA provides that a building restriction covenant survives a tax sale, mortgage sale or foreclosure. These provisions should be amended to refer expressly to development schemes as well.

**RECOMMENDATION 12**

**Section 141 of *The Real Property Act* should be amended to provide that a development scheme is not extinguished by tax sale, mortgage sale or foreclosure.**

Both *The City of Winnipeg Charter* and *The Planning Act* provide that municipal zoning by-laws do not affect the right to enforce a restriction, interest or covenant. Both provisions should be amended to include development schemes.[35]

**RECOMMENDATION 13**

**Section 238 of *The City of Winnipeg Charter* and section 84 of *The Planning Act* should be amended to include development schemes.**

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[35] *The City of Winnipeg Charter*, S.M. 2002, c.39; *The Planning Act*, C.C.S.M. c. P80, s.84.

*The Public Schools Act*[36] relieves a school board of compliance with a building restriction for land purchased for its purposes. That Act should be amended to include a development scheme in addition to a building restriction.

**RECOMMENDATION 14**

**Section 66 of *The Public Schools Act* should be amended to refer to development schemes.**

[36] *The Public Schools Act*, C.C.S.M. c. P250, s.66.

## CHAPTER 4

## LIST OF RECOMMENDATIONS

1. *The Real Property Act* should be amended to permit recording of a scheme of restrictions on title, either by caveat with agreement attached or by unilateral declaration in a form to be approved by the district registrar.

2. A scheme created by unilateral declaration should have the same effect as an agreement.

3. *The Real Property Act* should include a definition of "building restriction" as a restriction on the construction of buildings, fences and other structures on, over or under land, the use, intensity of use and any change in the use or intensity of use of a building or land, the removal of soil or vegetation from land, the deposit or stockpiling of soil or material on land, and the excavation of land, that is negative in effect and benefits other land.

4. *The Real Property Act* should include a definition of "development scheme" as an agreement or declaration which is expressly intended to constitute a special local law and which:
   (a) affects two or more parcels, each of which is identified by reference to its legal description;
   (b) contains one or more building restrictions which are:
      (i) clearly intended to attach to and run with the land; and
      (ii) clearly described so that a reasonable person may understand and comply;
   (c) applies to land which is reasonably proximate but not necessarily contiguous;
   (d) is consistent with a general scheme of development and affects all lots in a uniform but not necessarily identical way; and
   (e) clearly identifies any variations in or exemptions from the scheme and the lots to which these variations or exemptions apply.

5. The district registrar should create a standard form development scheme declaration to provide minimum formal requirements and guidance to persons wishing to create and record a development scheme.

6. The Act should expressly provide that recording of a development scheme is not a determination by the district registrar of the validity of the scheme and that the rules of equity and common law continue in force, except where inconsistent with the express provisions of the Act.

7. The common vendor rule set out in *Elliston v. Reacher* should be expressly abrogated.

8. Section 7 of *The Law of Property Act* should be amended to include building restrictions and development schemes.

9. Section 7(2) of *The Law of Property Act* should be amended to provide a precise definition of "elderly persons".

10. An instrument creating a development scheme may be registered on title to land if it:
    (a) is in a form approved by the district registrar and executed in accordance with section 72(1) of *The Real Property Act*;
    (b) affects two or more parcels of land all of which are registered under the Act and identified by legal description;
    (c) is clearly intended to attach to and run with the land;
    (d) has the consent of all persons whose names appear on the register as having a claim or interest before the date of the instrument;
    (e) contains one or more restrictions which appear to be negative in effect.

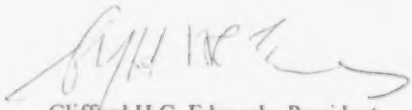
11. The provisions of *The Real Property Act* and *The Municipal Board Act* respecting the vacating, varying, amending, discharging or lapsing of building restrictions should be amended to include development schemes

12. Section 141 of *The Real Property Act* should be amended to provide that a development scheme is not extinguished by tax sale, mortgage sale or foreclosure.

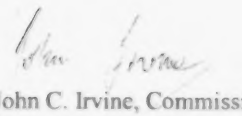
13. Section 238 of *The City of Winnipeg Charter* and section 84 of *The Planning Act* should be amended to include development schemes.

14. *Section 66 of The Public Schools Act* should be amended to refer to development schemes.

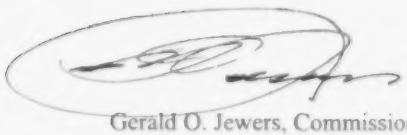
This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 20th day of June 2006.



Clifford H.C. Edwards, President



John C. Irvine, Commissioner



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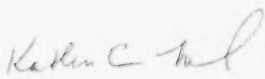
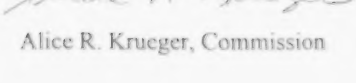


Kathleen C. Murphy, Commissioner



Alice R. Krueger, Commission

## APPENDIX A

## DRAFT AMENDING ACT

### DRAFT AMENDING ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

### PART 1

### THE REAL PROPERTY ACT

**C.C.S.M. c. R30 amended**

1. *The Real Property Act* is amended by this Part.

2. Section 1 is amended by adding the following definitions:

"**building restriction**" mean a restriction relating to the construction of buildings, fences and other structures on, over or under land, the use, intensity of use and any change in the use or intensity of use of a building or land, the removal of soil or vegetation from land, the deposit or stockpiling of soil or material on land, and the excavation of land, that is negative in effect benefits other land. (« restrictions à la construction »)

Implements recommendation #3 (see page 8)

"**development scheme**" means a agreement or declaration which contains one or more building restrictions and which is intended to constitute a special local law applicable to a defined area.

Implements recommendation #1 and #4 (see page 7 & 11)

3. The following is added as Section 76.2:

**Development Schemes**

**76.2** A person or persons who are or are entitled to be the owner or owners of land may, by agreement or by declaration in a form approved by the district registrar, create a development scheme in respect of their land provided that the scheme:

Implements recommendation #4 (see page 11)

(a) contains one or more restrictions or obligations which are:
  (i) negative in effect;
  (ii) clearly intended to attach to and run with the land; and
  (iii) clearly described so that a reasonable person may understand and comply;
(b) affects two or more parcels, each of which is identified by reference to its legal description;
(c) affects only land which is reasonably proximate but not necessarily contiguous;
(d) is consistent with a general scheme of development and affects all lots uniformly but not necessarily identically; and
(e) contains variations in or exemptions from the terms of the scheme and the lots to which these variations or exemptions apply, are clearly identified.

**76.2(2)** The common vendor requirement set out in *Elliston v. Reacher* is hereby abrogated.

Implements recommendation #7 (see page 14)

**76.2(3)** A development scheme may be registered against the lands affected thereby if:

Implements recommendation #9 (see page 15)

(a) it is presented for registration in a form approved by the district registrar and executed in accordance with section 72(1);
(b) it affects two or more parcels of land which are registered under the Act and identified by legal description;
(c) it is clearly stated to attach to and run with the land;
(d) all persons whose names appear on the register to have a claim or interest before the date of the instrument consent to its registration; and
(e) it contains one or more restrictions which appear to be negative in effect.

**76.2(4)** The registration of a building restriction or development scheme is not a determination by the district registrar of its validity or enforceability and the rules of equity and common law applicable to building restrictions and development schemes continue in force, except so far as they are inconsistent with the express provisions of this Act.

Implements recommendation #6 (see page 12)

**76.2(5)** A development scheme may be varied or discharged by:

(a) the registration of an amending instrument or a discharge thereof in a form approved by the district registrar, executed by the registered owners of all the lands against which the instrument is registered, and consent to which has been given by all persons whose names appear on the register as having a claim or interest before the date of the agreement ; or

(b) an order of the Municipal Board under section 104 of *The Municipal Board Act*, and the district registrar, upon receipt of the written consent or order, shall amend the register accordingly.

Implements recommendation #10 (see page 16)

4. Section 45(5) is replaced with the following:

**45(5)** Where land is sold for taxes it shall be deemed to have been sold subject to those instruments set out in subsection 111(1), utility and pipeline easements as set out in section 112, building restrictions, easement agreements, including party wall and right of way agreements, development schemes, caveats relating to zoning, subdivision or development agreements, caveats or agreements filed relating to an expropriation, any notice filed under subsection 7(1) of *The Contaminated Sites Remediation Act* and any order or caveat filed in a land titles office under section 17 of *The Water Resources Administration Act*.

Implements recommendation #11 (see page 17)

5. Section 141 is replaced with the following:

**141** Where land is sold pursuant to an order for sale made by the district registrar, or vests in a mortgagee by an order of foreclosure issued by the district registrar, it shall be deemed to have been sold or vested subject to those instruments set out in subsection 111(1), utility and pipeline easements as set out in section 112, building restrictions, easement agreements, including party wall and right of way agreements, development schemes, caveats relating to zoning, subdivision or development agreements, caveats or agreements filed relating to an expropriation, any notice filed under subsection 7(1) of *The Contaminated Sites Remediation Act* and any lien described in subsection 36(4) of that Act, and any order, notice or cancellation of a notice filed in a land

Implements recommendation #11 (see page 17)

titles office under section 17 of *The Water Resources Administration Act*.

6. Subsection 157(3) is replaced with the following:

**157(3)** Subsection (1) does not apply to the discharge of a building restriction or development scheme unless the owners of all lands affected by the building restriction or development scheme approve the discharge in such manner as is satisfactory to the district registrar.

Implements recommendation #10 (see page 16)

7. Subsection 157(5) is replaced with the following:

**157(5)** Where a building restriction or development scheme that is registered contains a provision that the building restriction or development scheme terminates upon a specified date, the district registrar may discharge the building restriction or development scheme and vacate any such caveat giving notice thereof, as to all or part of the lands affected, at any time after the date of termination.

Implements recommendation #10 (see page 16)

8. Subsection 159(1) is amended by adding the words "and development schemes" following "building restrictions".

Implements recommendation #10 (see page 16)

**159(1)** the district registrar shall vacate all building restrictions **and development schemes** after the expiry of 50 years from the date of the filing thereof; and when so vacated, any instrument on which they were founded or giving notice thereof, shall cease to have any effect.

**PART 2**

**THE LAW OF PROPERTY ACT,**

**C.C.S.M. C.190 amended**

9. *The Law of Property Act* is amended by this Part.

Implements recommendation #10 (see page 16)

10. Subsection 7(1) is amended by adding the words "building restriction or development scheme" following the word "covenant".

**7(1)** Every covenant, **building restriction or development scheme** which, but for this section, would be annexed to and run with land and which restricts the sale, ownership, occupation or use of land because of the race, nationality, religion, colour, sex, sexual orientation, age, martial status, family status, physical or mental handicap, ethnic or national origin, source of income or political belief or any person is void.

## PART 3

## THE MUNICIPAL BOARD ACT

### C.C.S.M. C.m240 amended

11. *The Municipal Board Act* is amended by this Part.

12. Subsection 104(1) is amended by adding words "or development scheme" following "building restriction".

Implements recommendation #10 (see page 16)

**104(1)** Subject to subsection (3), the board, after such notice and hearing as it deems proper and upon such terms and conditions as it may fix, may by order vary, cancel, or substitute, in whole or in part, any building restriction **or development scheme** affecting lands, or the use thereof, howsoever created, and may order the discharge, removal or amendment of any instrument recording the restriction or development scheme.

13. Subsection 104(3) is amended by adding the words "or development scheme" after "building restrictions" wherever it appears.

**104(3)** Where lands affected by the building restriction **or development scheme** are included in The City of Winnipeg, the board shall not make an order under subsection (1) unless the council of The City of Winnipeg has, by resolution, recommended the variation, cancellation or substitution of building restriction **or development scheme** and a certified copy of the resolution is filed with the Board.

## PART 4

## THE PLANNING ACT

### C.C.S.M. c.P80 amended

14. *The Planning Act* is amended by this Part.

Implements recommendation #13 (see page 17)

15. Section 84 is replaced with the following:

**84** A zoning by-law does not rescind or affect the right of any person to enforce a building restriction, development scheme, interest or covenant affecting land if the restriction, scheme, interest or covenant is registered against the land in the land titles office.

**PART 5**

**THE CITY OF WINNIPEG CHARTER**

**S.M. 2002, c.39 amended**

16. *The City of Winnipeg* Charter is amended by this Part.

Implements recommendation #13 (see page 17)

17. Section 238 is replaced with the following:

**238** A zoning by-law does not rescind or affect the right of any person to enforce a building restriction, development scheme, interest, or covenant affecting land if the restriction, scheme, interest or covenant is registered against the land in the land titles office.

**PART 6**

**THE PUBLIC SCHOOLS ACT**

**C.C.S.M. c.P250 amended**

18. *The Public Schools Act* is amended by this part.

Implements recommendation #14 (see page 18)

19. Section 66 is amended by adding the words "or development scheme" after "building restriction" wherever it appears.

**66** Notwithstanding any provision of this Act where a school board purchases land that is subject to a building restriction **or development scheme**, the land may be used by the school division or school district for its purposes in any manner notwithstanding the building restriction **or development scheme.**

## APPENDIX B

### *Land Title Act*, R.S.B.C. 1996, c. 250

**Definitions**

1. In this Act . . . **"building scheme"** means a scheme of development that comes into existence where defined land is laid out in parcels and intended to be sold to different purchasers or leased or subleased to different lessees, each of whom enters into a restrictive covenant with the common vendor or lessor agreeing that his or her particular parcel is subject to certain restrictions as to use, the restrictive covenants constituting a special local law applicable to the defined land and the benefit and burden of the covenants passing to, as the case may be, the purchaser, lessee or sublessee of the parcel and his or her successors in title.

**Statutory building scheme and letting scheme**

220 (1) If a registered owner in fee simple intends to sell or lease or a registered lessee intends to sublease 2 or more parcels and to impose restrictions consistent with a general scheme of development, the registered owner may register a Declaration of Creation of Building Scheme in the form approved by the director, herein referred to as the declaration of building scheme, as a charge against the land defined in the declaration of building scheme.

(2) On receiving the declaration of building scheme, the registrar must make an endorsement of it in the appropriate register.

(3) From the date of the endorsement, the restrictions created by the declaration of building scheme run with and bind all the land affected and every part of it without further registration, but subject to this section and to the provisions of an applicable lease or sublease, render;

(a) the owner,

(b) each purchaser, lessee and sublessee of all or part of the land, and

(c) each successor in title, future purchaser, lessee and sublessee of the land. Subject to the restrictions and confer on them the benefits of the building scheme, unless in the declaration of building scheme the owner in fee simple or the registered lessee expressly reserves the right to exempt that part of the land remaining undisposed of at the time the exemption takes effect from all or any of the restrictions and benefits.

(4) The owners for the time being of the land defined in the declaration of building scheme may consent to a modification or discharge of all or part of the registration, and the registrar, on application and on production of evidence satisfactory to the registrar, must amend the records accordingly.

(5) Section 221 applies to the declaration of building scheme.

(6) A declaration of a building scheme or a modification or discharge of it is not registered in respect of land that is subject to a charge unless;

(a) the holder of the charge consents to the registration and grants priority to the scheme or the modification of it or consents to the discharge of it, or

(b) the registrar orders that the holder of the charge is not required to consent or grant priority or to do either.

(7) A declaration of building scheme registered under this section may be referred to as a statutory building or a statutory letting scheme.

(8) After October 30, 1979, no instrument creating a building scheme in a manner other than that provided by this section is registered, but the registrar may allow the registration of the instrument on the ground that refusal to register would cause hardship or economic loss.

(9) Section 35 of the Property Law Act applies to a declaration of building scheme registered under this section.

**Requirements of registered restrictive covenant**

221(1) The registrar must not register a restrictive covenant unless;

(a) the obligation that the covenant purports to create is, in the registrar's opinion, negative or restrictive,

(b) the land to which the benefit of the covenant is annexed and the land subject to the burden of the covenant are both satisfactorily described in the instrument creating the covenant, and

(c) the title to the land affected is registered under this Act.

(2) The registration of a restrictive covenant is not a determination by the registrar of its essential nature or enforceability.

**Discriminating covenants are void**

222 (1) A covenant that, directly or indirectly, restricts the sale, ownership, occupation or use of land on account of the sex, race, creed, colour, nationality, ancestry or place of origin of a person, however created, whether before or after the coming into force of this section, is void and of no effect.

(2) The registrar, on application, may cancel a covenant referred to in subsection (1) that was registered before October 31, 1979.

(3) If the registrar has notice that a registered restrictive covenant is void under this section, the registrar may, on the registrar's own initiative, cancel the covenant.

**Subdivision of dominant tenement**

223 (1) If a dominant tenement is subdivided in whole or in part, on the deposit of a plan of subdivision:

(a) the benefit of a registered appurtenant easement is annexed to each of the new parcels shown on the plan,

(b) the burden of the easement is increased accordingly, even though the owner of the servient tenement has not consented to the increase, and

(c) dominant tenement, unless the instrument creating the easement expressly provides otherwise, or the subdivider designates on the plan the parcel of a part of the land to which the benefit does not attach.

(2) A designation under subsection (1) witnessed or proved in accordance with this Act is sufficient authority for the registrar to give effect to it and to make the necessary endorsements in the records.

(3) Subsection (1) (b) applies only to easements registered after October 30, 1979.

## APPENDIX C

### *Land Title Act Regulation*, B.C. Reg 334/79, Form 35

*LAND TITLE ACT*

**FORM 35**
(section 220(1))

**DECLARATION OF BUILDING SCHEME**

NATURE OF INTEREST CHARGE: Building Scheme

HEREWITH FEES OF: $ *[amount]*

Address of person entitled to apply to register this building scheme:

Full name, address, and telephone number of person presenting application:

_____
Signature of Applicant or
Solicitor or Authorized Agent

I, *[name and address of owner]* declare that:

1. I am the *[registered owner in fee simple/lessee]* of the following land (the "Lots"): *[legal description]*

2. I hereby create a building scheme relating to the Lots.

3. A sale of any of the Lots is subject to the restrictions enumerated in the schedule attached or annexed hereto.

4. The restrictions shall be for the benefit of all the Lots.

EXECUTION(S):

| Officer Signature(s) | Execution Date | | | Chargeholder Signature(s) |
|---|---|---|---|---|
| | Y | M | D | |
| _____ | | | | _____ |
| | | | | _____ |

OFFICER CERTIFICATION

Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, R.S.B.C. 1996, c. 124, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* as they pertain to the execution of this instrument.

CONSENT AND PRIORITY AGREEMENT OF CHARGE HOLDERS

We [names of chargholders], of [addresses of chargeholders], the holders of the following registered charges, consent to the registration of the above Declaration of Building Scheme and agree that it shall have priority over our respective charges.

EXECUTION(S):

| Officer Signature(s) | Execution Date | | | Chargeholder Signature(s) |
|---|---|---|---|---|
| | Y | M | D | |
| | | | | |

OFFICER CERTIFICATION

Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, R.S.B.C. 1996, c. 124, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* as they pertain to the execution of this instrument.

Notes: 1. The consent and grant of priority of chargeholders may be in separate counterparts of Form 35.

2. The execution of all declaring or consenting parties must be witnessed in accordance with Part 5 of the *Land Title Act*.

3. The type and registration number of the charge must be typed or printed immediately below the signature of the owner of the charge.

SCHEDULE OF RESTRICTIONS

## DEVELOPMENT SCHEMES

## EXECUTIVE SUMMARY

### A. INTRODUCTION

This Report considers amendments to *The Real Property Act* (the RPA) to make it easier to create and record a development scheme on title of land, (traditionally called a common building scheme). A development scheme is established when agreements between a vendor and the respective purchasers of lots, which contain building restrictions, are recorded on title. This somewhat piecemeal approach is not only inconvenient for the vendor but it may also limit the effect of the scheme, potentially frustrating the reasonable expectations of purchasers. In Manitoba, section 76 of the RPA allows an owner of land to create party wall obligations, easements and rights-of-way unilaterally and this report considers whether to extend the same privilege for development schemes.

### B. THE LAW RELATING TO BUILDING SCHEMES

At common law, the burden of a restrictive covenant affecting land binds only the original parties to the covenant and not their successors in title. Equitable rules were developed in the late 19th century to allow the burden of a certain restrictive covenants to run with the land followed by further rules to enforce development schemes. Both the common law and rules of equity ("the general law") continue to apply in Canada but have been widely acknowledged as confusing and complex. As well as meeting the requirements of the general law, a development scheme must be recorded on title to be enforceable against subsequent owners.

### C. RECOMMENDATIONS FOR REFORM

It is the Commission's view that allowing owners of land to create and record a development scheme by unilateral declaration as well by agreement facilitates economic activity involving land and protects the reasonable expectations of purchasers. The Commission therefore recommends the addition to the RPA of a provision similar to section 76 and modeled on British Columbia's statutory building scheme provisions.

In order to avoid confusion, the Commission suggests a statutory definition of building restriction to be used consistently in all legislation. As well, the Commission expresses a preference for the term "development scheme' rather than the traditional "building scheme" as the former is more descriptive of the broad range of matters covered in such schemes.

Due to the complexity of the law, the Commission does not recommend a complete codification of the general law relating to development schemes but instead suggests incorporation of key elements into the legislation with modifications appropriate to modern circumstances. A development scheme must clearly identify all lands included or exempted from the restrictions and these lands must be reasonably proximate to each other. The restrictions in the scheme must be negative in effect, set out in clear language and apply uniformly and consistently to the affected lands. Lastly, the instrument creating the scheme must state that the restrictions are intended to attach to and run with the land.

The Commission recommends variation of two aspects of the general law. Firstly, a developer should not be permitted to exempt unsold lots from the application of the scheme as this would defeat the reasonable expectation of purchasers. Secondly, it recommends that the common vendor rule, which no longer applies in England, be expressly abrogated. This would allow continuation of a scheme despite a change of vendor and would allow a group of owners to create a scheme for their mutual benefit. The Commission does not recommend any change to the rules relating to positive covenants as such change requires extensive study and careful consideration. The Commission does note the harshness of the existing law and the desirability of reform in this area.

In addition to the suggested pre-requisites to validity of a development scheme, the Commission also recommends certain formal pre-requisites to recording of the scheme on title. A development scheme should meet such formal requirements as are determined by the district registrar and should be executed in accordance with section 72(1) of the RPA. In order to provide assistance to drafters, the district registrar should create a statutory form, similar to that used in British Columbia, but its use should not be made mandatory. A scheme must affect at least two separate parcels of land which are registered under the RPA and are clearly identified by their legal description. It must contain one or more restrictions which appear to be negative in effect and must also clearly state that the restrictions attach to and run with the land. Finally, all persons whose names appear on the register as having a claim or interest before the date of the development scheme instrument must consent to its registration on title.

The Commission further recommends that a development scheme be terminated or varied in the same way that a building restriction may be; by unanimous agreement or by order of the Manitoba Municipal Board. Although it does not agree with the automatic expiry of such schemes after 50 years, for the sake of consistency, the Commission does not recommend a different rule for development schemes.

Finally, the Commission recommends minor amendments to ensure that provisions affecting building restrictions or restrictive covenants also apply to development schemes including survival following tax sale, mortgage sale or foreclosure proceedings, compatibility with municipal zoning by-laws and town planning schemes and exemptions from compliance for school boards.

The Report also contains draft legislation which implements the recommendations of the Commission.

## SCHÉMAS D'AMÉNAGEMENT

## SOMMAIRE

### A. INTRODUCTION

Le présent rapport présente des modifications qui pourraient être apportées à la *Loi sur les biens réels* (la *LBR*) pour faciliter la création et l'enregistrement d'un schéma d'aménagement (qu'on appelle en général « projet de construction ordinaire ou *common building scheme* ») sur le titre d'un bien-fonds. Un schéma d'aménagement est un instrument par le biais duquel on enregistre sur un titre des conventions imposant des restrictions à la construction entre vendeur et acheteurs respectifs des parcelles. Une telle pratique complique non seulement la position du vendeur, mais peut aussi restreindre la portée du schéma d'aménagement, et risque de frustrer les attentes raisonnables des acheteurs. Au Manitoba, l'article 76 de la *LBR* autorise le propriétaire d'un bien-fonds à fixer unilatéralement des obligations relatives à des murs mitoyens, des servitudes ou des droits de passage. Le présent rapport étudie la possibilité d'étendre ce privilège aux schémas d'aménagement.

### B. POSITION DE LA LOI RELATIVEMENT AUX PROJETS DE CONSTRUCTION

En *common law*, le fardeau d'une clause restrictive sur un bien-fonds lie uniquement les parties d'origine et non leurs successeurs dans le titre. Des règles équitables furent élaborées à la fin du XIX[e] siècle afin de permettre au fardeau de certaines clauses restrictives d'être accessoires au bien-fonds, puis d'autres règles furent adoptées pour reconnaître la validité des schémas d'aménagement. Tant la *common law* que les règles d'équité (le droit commun) continuent de s'appliquer au Canada, mais leur caractère déroutant et complexe a été amplement souligné. En plus de satisfaire aux exigences du droit commun, un schéma d'aménagement doit, pour être opposable aux propriétaires subséquents, être enregistré sur le titre.

### C. RECOMMANDATIONS EN VUE D'UNE RÉFORME

La Commission estime que le fait d'autoriser les propriétaires de biens-fonds à créer et enregistrer un schéma d'aménagement par déclaration unilatérale ou d'un commun accord facilite l'activité économique qui entoure les biens-fonds et protège les attentes raisonnables des acheteurs. La Commission recommande donc l'intégration à la *LBR* d'une nouvelle disposition, semblable à celle touchant les murs mitoyens, les servitudes et les droits de passage (article 76), et inspirée des dispositions légales de la Colombie-Britannique sur les projets de construction (*building schemes*), qui autorisent un promoteur à imposer des restrictions par déclaration unilatérale avant la vente de parcelles. Le rapport contient aussi une ébauche de dispositions légales qui respecteraient les recommandations de la Commission.

Pour éviter toute confusion, la Commission propose une définition légale de « restriction à la construction », qui s'appliquerait uniformément à tous les textes de loi. En outre, la Commission préfère le terme « schéma d'aménagement » (*development scheme*) à celui de

« projet de construction » (*building scheme*), car le premier décrit mieux l'ampleur et la portée de tels schémas ou plans.

Devant la complexité de la loi, la Commission ne recommande pas de codification complète du droit commun en ce qui concerne les schémas d'aménagement, mais suggère plutôt l'incorporation d'éléments clés à la loi, moyennant des modifications appropriées aux pratiques modernes. Un schéma d'aménagement doit clairement identifier tous les biens-fonds visés par les restrictions, ou qui en sont exemptés, et de tels biens-fonds doivent être raisonnablement proches les uns des autres. Les restrictions imposées dans le schéma doivent avoir un effet négatif, être formulées en langage clair et s'appliquer de façon uniforme et cohérente aux biens-fonds visés. Enfin, l'instrument créant le schéma doit stipuler que les restrictions grèvent le bien-fonds et lui sont accessoires.

La Commission recommande des changements à deux aspects du droit commun. D'abord, un promoteur ne devrait pas être autorisé à exempter des parcelles invendues de l'application du schéma, car cela frustrerait les attentes raisonnables des acheteurs. Ensuite, elle recommande que la *common vendor rule*, qui ne s'applique plus en Angleterre, soit abrogée expressément. Cela permettrait le maintien d'un schéma malgré un changement de vendeur et autoriserait un groupe de propriétaires à créer un schéma pour leur avantage commun. La Commission ne recommande pas de modification aux règles touchant les clauses positives. De telles modifications nécessiteraient une étude approfondie et une plus ample réflexion. La Commission rappelle la rigueur de la loi existante et souligne l'opportunité d'une réforme à cet égard.

Outre les prérequis suggérés pour la validité d'un schéma d'aménagement, la Commission recommande l'imposition de prérequis formels à l'enregistrement du schéma d'aménagement sur le titre. Un schéma devrait respecter de telles exigences formelles, comme déterminées par le registraire de district, et devrait être passé conformément au paragraphe 72(1) de la *LBR*. Afin de faciliter le travail des rédacteurs, le registraire de district devrait créer - sans toutefois en imposer l'usage - une formule réglementaire semblable à celle qu'on utilise en Colombie-Britannique. Un schéma d'aménagement doit affecter au moins deux parcelles distinctes qui sont enregistrées selon la *LBR* et clairement identifiées par leur description légale. Il doit contenir une ou plusieurs restrictions d'aspect négatif et énoncer clairement que les restrictions grèvent le bien-fonds et lui sont accessoires. Enfin, toutes les personnes dont les noms indiquent au registre qu'elles possèdent un droit ou un intérêt avant la date de l'instrument du schéma d'aménagement doivent consentir à son enregistrement sur le titre.

La Commission recommande en outre qu'un schéma d'aménagement soit résilié ou modifié comme peut l'être une restriction à la construction : par consentement unanime ou sur ordre de la Commission municipale du Manitoba. Même si cela ne correspond pas à l'expiration automatique de tels schémas après 50 années, la Commission ne recommande pas, pour des raisons de cohérence, de règles différentes pour les schémas d'aménagement.

Enfin, la Commission recommande des modifications mineures selon lesquelles les dispositions touchant les restrictions à la construction ou les clauses restrictives s'appliqueront aussi aux schémas d'aménagement - maintien dans le cas des opérations touchant la vente pour taxe, la vente pour hypothèque ou les mesures de forclusion; compatibilité avec les règlements de zonage municipaux et les plans directeurs des villages; exemptions des obligations de conformité pour les commissions scolaires.